(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 304

EUGENE DIETZGEN CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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SUBJECT MATTER INDEX.

ALPHABETICAL TABLE OF CASES CITED.

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Opinions of the Circuit Court of Appeals.

The original opinion of the Circuit Court of Appeals was rendered on February 29, 1944 and is reported in 142 F. (2d) 321 (Appendix 1, R. 991, 1006). A petition for rehearing was filed on March 14, 1944 (R. 1006).

The Circuit Court, on May 3, 1944, rendered a supplemental opinion (not yet reported) (Appendix 17; R. 1012, 1014) and denied the petition for rehearing (R. 1014).

Jurisdiction.

The grounds for the jurisdiction of this Court are set forth in the petition (p. 2).

The decree of the Circuit Court sought to be reviewed was entered May 22, 1944 (R. 1016).

Summary of the Matters Involved.

A summary of the matters involved appears under the above heading, beginning on page 3 of the petition, which deals with the nature of and the material allegations of the complaint instituted by the Commission and subsequent proceedings under the following sub-heads: Separate Answer of Eugene Dietzgen Co. to the Complaint; Certain Facts Stipulated; Petitioner Resigned from SAMA and the SDC Section March 4, 1938; McDonald Testimony; Certain Charges in Complaint Not Sustained by Commission.

Specification of Errors to Be Urged.

If the writ is granted, petitioner will urge that the Circuit Court erred in the following respects:

(1) In holding that the Federal Trade Commission had jurisdiction and power

(a) To file a complaint alleging completed and continuing violations of the Sherman Act as constituting unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

(b) Under said complaint to hold hearings thereon and to determine the existence of the violations of the civil and criminal provisions of the Sherman Act alleged in the complaint, which would require the exercise of full and complete judicial power although it is only an administrative body.

(c) To declare by its fiat that such violations of the Sherman Act constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

(d) To enter a cease and desist order in complete injunctive form, restraining petitioner and others from carrying out the agreements, understandings, combinations and conspiracies in violation of the Sherman Act found by it to exist.

(e) To administer the Sherman Act, and restrain violations thereof, although said Act vests exclusive jurisdiction in the District Courts to enforce said Act, and to enjoin violations thereof.

(2) In holding that it was unnecessary to prove the existence of competitors of petitioner, either actual or potential, or to prove that any of such competitors or their businesses were in any manner injured or their business injuriously affected by any act or acts of the petitioner.

(3) In holding that subsequent to the decision of this Court in *Shechter Poultry Corporation* v. *United States*, 295 U. S. 495, the petitioner's action in compliance with the President's request for voluntary code observance, in continuing to adhere to its prices and discounts, filed as required by the Code and the National Industrial Recovery Act, constituted a violation of the Sherman Anti-Trust Act notwithstanding the provisions of Section 4(a) of the National Industrial Recovery Act.

(4) In holding that Section 3.1 of Article II of the "Rules of Fair Competition" of the SDC Section (Exhibit 11-a) constitutes a violation of the Sherman Act and a violation of Section 5 of the Federal Trade Commission Act.

(5) In sanctioning the action of the Federal Trade Commission, in receiving in evidence over the objections of the petitioner, certain correspondence and documents obtained by it in the course of its investigation of the matters involved in the complaint, from the files of other respondents, and then upon the demand of the petitioner refusing to produce such other correspondence and documents obtained by it at the same time from the files of such other respondents, relating to the same matters and in the same investigation, and then in its possession, which other correspondence and documents were not available from any

other source, and which refusal deprived petitioner of a fair hearing, as required by Section 5(c) of the Federal Trade Commission Act, and constituted a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(6) In holding that the cease and desist order entered by the Commission was supported by lawful evidence, and that it was not contrary to the undisputed evidence of record before the Commission.

Questions Presented by the Petition Are Within the Scope of Paragraph 5 (b) of Rule 38 of the Rules of This Court.

On Pages 18 to 20 of the petition for the writ, petitioner sets forth ten questions presented to this Court. All of these questions were presented to the Federal Trade Commission and to the Circuit Court of Appeals, and all of them were decided adversely to the contentions of the petitioner both by the Commission and by the Circuit Court.

Erroneous Statements of Fact in Opinion of the Circuit Court.

In its first opinion of February 29, 1944, the Circuit Court has made certain erroneous statements of fact which were not corrected in its opinion of May 3, 1944. We deem it important to call the attention of this Court to some of these erroneous statements.

1. In its opinion (Appendix, p. 2), the Circuit Court said:

> "Some of the competitors engaged in this business, first associated together in a trade organization in April, 1919. This same organization incorporated in January, 1936, and was known as the Scientific Apparatus Makers of America, hereinafter referred to as 'SAMA.' "

In Paragraph 2 of the Stipulation of Facts (R. 134) it is stated, in substance, that SAMA first organized in April, 1919, limited its members to those engaged in the production of strictly scientific instruments and did not remove such limitation until some time after June 16, 1933 (subsequent to enactment of N. I. R. A.). Petitioner and other respondents, in the proceeding before the Commission, did not become members of SAMA until approximately August 1, 1933, when they did so at the request of SAMA and for the purpose of joining said Association in applying for a code of fair competition, as provided in the National Industrial Recovery Act (Stip., Par. 5, R. 134, 135).

2. In its opinion, the Circuit Court states (Appendix, pp. 4, 5):

> "The F. T. C. reached the conclusion that a conspiracy was formulated (and later carried out) at the four meetings of the S. D. C. Section and SAMA held first in June, 1932, at Detroit, * * *."

This is a complete misapprehension of the facts, as shown by the stipulated facts above referred to. The petitioner and other respondents were not members of SAMA in 1932, and there was no S. D. C. Section in existence at that time (Stip., Par. 2, 5; R. 134, 135).

ARGUMENT.

I.

First Reason Relied Upon for the Allowance of the Writ.

The question, broadly stated, is whether the Federal Trade Commission has the jurisdiction and power, under the Federal Trade Commission Act, to administer the Sherman Act by hearing and determining violations of both the civil and criminal provisions thereof and then restrain the carrying out of the same through a cease and desist order completely injunctive in form, and thus usurp the jurisdiction and powers vested by the Sherman Act in the District Courts of the United States to enforce said Act.

The question set forth in detail in said petition has been subdivided into paragraphs (a), (b), (c), (d) and (e) (Petition, pp. 21, 22). These subparagraphs show the various steps taken by the Commission, the nature thereof, the determinations reached, the various types of powers exercised in entering the order complained of, each of which must be considered in determining the jurisdiction and powers of the Federal Trade Commission under the Federal Trade Commission Act.

The Circuit Court decided that the Federal Trade Commission has the jurisdiction and power to perform the acts set forth in the question and its various subparagraphs (Appendix, pp. 6, 7).

The petitioner earnestly contends after most diligent search, that this vitally important question, which goes to the very foundation of the jurisdiction and power of the Federal Trade Commission in a case of this character, has never been presented to or decided by this Court in any prior case.

The Circuit Court in its opinion (Appendix, p. 6) states that the question raised is not new and that this Court has decided the question in accordance with the conclusion of the Circuit Court shown in its opinion (Appendix, p. 7).

In support of this conclusion the Circuit Court cites three cases decided by this Court:

Fashion Originators Guild v. *Federal Trade Commission*, 312 U. S. 457; 61 Sup. Ct. Rep. 703.

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441.

Federal Trade Commission v. *Pacific States Paper Trade Assn., et al.*, 273 U. S. 52, 47 S. Ct. Rep. 255.

Petitioner believes an analysis of each of these cases will clearly establish that the question now presented was not presented to or decided by this Court in said cases.

Analysis of Fashion Guild Case.

The complaint instituted by the Commission in that case charged that the acts and things set forth therein constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. On page 463 of the opinion this Court, speaking through Mr. Justice Black, said:

> 'If the purpose and practice of the combination of garment manufacturers and their affiliates *runs counter to the public policy declared in the Sherman and Clayton Acts*, the Federal Trade Commission has the power to suppress it as an unfair method of competition." (Italics supplied.)

This statement is similar to one in the Beechnut case shown later and must be construed in connection with the statements of this Court in the Raladam and other cases hereinafter cited, to mean that the Commission was to

stop in their incipiency practices which, if permitted to continue, might ripen into violations of the Sherman Act.

It was evidently not intended to mean that the Commission could hear and determine that parties had in fact violated the provisions of the civil and particularly the criminal sections of the Sherman Act, as the Circuit Court in the instant case held, and then issue an order in injunctive form as the District Courts are empowered to do by the provisions of that act. Such a construction of the statement in the opinion of this Court would in effect give the Commission concurrent jurisdiction with the District Courts to enforce the provisions of the Sherman Act.

This Court on page 464 of its opinion commented on the Commission's findings of fact as to the existence of understandings, agreements, combinations and conspiracies entered into jointly and severally by the petitioners.

It further noted on said page that the Commission found that the agreements, etc., mentioned had prevented sales in interstate commerce, and had "substantially lessened, hindered and suppressed" competition, and had "tended to create in themselves a monopoly."

After observing the foregoing matters this Court, on the same page of the opinion, then quoted the material portions of Section 3 of the Clayton Act (38 Stat. 731; 15 U. S. C. A., Sec. 14).

In substance, said Section 3 declares that it shall be unlawful for any person engaged in commerce to lease or make a sale or contract for a sale of goods or machinery, patented or unpatented, for use or resale, or fix the price to be charged therefor or the discount therefrom, on the condition, agreement or understanding that the purchaser or lessee thereof shall not use or deal in the goods or ma-

chinery of a competitor or competitors of the seller or lessor

> "where the effect of such sale or contract may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

With reference to the Clayton Act, the Commission is expressly authorized by Section 11 to institute a complaint based upon alleged violations of said Section 3.

This Court in its opinion clearly indicates that the acts found by the Commission in that case constituted a violation of Section 3 of the Clayton Act, as shown by the following statement in the opinion of this Court (p. 464):

> "The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that the buyers will not use or deal in textiles which are copied from the designs of Textile Manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailer shall not use or deal in such copied designs."

This Court further stated, on said page:

> "*And the Federal Trade Commission concluded in the language of the Clayton Act* that this understanding substantially lessened competition and tended to create a monopoly." (Italics supplied.)

It thus appears that this Court considered that the acts found by the Commission constituted a clear violation of Section 3 of the Clayton Act which the Commission is empowered to enforce. The Commission did not proceed as it might have done under the provisions of Section 11 of the Clayton Act to restrain or prevent violations of Section 3 of said Act.

This Court then declared, on the same page:

> "We hold that the Commission, upon adequate and unchallenged findings correctly concluded that this practice constituted an unfair method of competition."

It does not appear that any contention was made that the Commission had no jurisdiction because the complaint was not filed under Section 11, but under Section 5.

The Clayton Act (38 Stat. 730; 15 U. S. C. A., Sec. 12, *et seq.*) was approved October 15, 1914, only nineteen days after the approval of the Federal Trade Commission Act (38 Stat. 718).

If the Federal Trade Commission already possessed the power to enforce the Clayton Act upon a complaint filed under Section 5 of the Federal Trade Commission Act, then the action of Congress in enacting Section 11 of the Clayton Act giving the Commission special jurisdiction to enforce Sections 2, 3, and 7 was a vain and useless act.

It must be conclusively presumed that Congress believed that in enacting Section 11 of the Clayton Act it was giving the Federal Trade Commission a new power not already possessed by it at the time that Act was adopted.

This presumption is further fortified by the action of Congress in the adoption of the Robinson-Patman Act (49 Stat. 1526, 15 U. S. C. A., Sec. 13) approved June 19, 1936, which amended Section 2 of the Clayton Act. Section 2 of the Robinson-Patman Act provides, in substance, that if the Commission proceeds to enforce Section 2 of the Clayton Act, as amended, it must do so by a complaint under Section 11 of said Act.

This Court did not, however, hold that the acts in that case constituted violations of the Sherman Act.

In the instant case, the complaint charges acts which, if true, clearly amounted to complete violations of the civil and criminal provisions of the Sherman Act.

A careful reading of the opinion of this Court shows that the jurisdiction and power of the Federal Trade Commission to enforce provisions of the Sherman Act

upon a complaint based upon the provisions of Section 5 of the Federal Trade Commission Act was not presented to or decided by this Court in said case.

Analysis of Beechnut Packing Company Case.

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441, 452, 453, 455, 456.

The Federal Trade Commission instituted a complaint under the provisions of Section 5 of the Federal Trade Commission Act against the Beechnut Packing Company, charging that said Company's complicated system of making sales, which demanded that its customers exact the retail prices imposed upon them by the stringent provisions of the agreement to sell, and permitted the Beechnut Company to examine the books of its customers and send out investigators to ascertain whether they were complying with their agreements, tended to create a monopoly, and it therefore made a finding that the acts complained of constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

It appears from this Court's opinion (pp. 454, 455) that the chief purpose of the Beechnut system of selling was to require the observance of resale prices of its goods. This also is a case which shows a clear violation of Section 3 of the Clayton Act, although in the majority opinion written by Mr. Justice Day there is no mention of that Act.

The Sherman Act is referred to in the majority opinion (p. 453) but is qualified by the statement that:

> "The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered *in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress.*" (Italics supplied.)

This language in the majority opinion of Mr. Justice Day has been construed to mean that the Federal Trade Commission Act is aimed at the elimination of methods of competition "which, if left untouched, would probably create the evils prohibited by the Sherman Anti-Trust Act." *Butterick Publishing Co.* v. *Federal Trade Commission*, 85 Fed. (2d) 522, 526."

In the Beechnut case there were four dissents. A dissenting opinion was written by Mr. Justice Holmes, in which Justices McKenna and Brandeis concurred, and a separate dissenting opinion was written by Mr. Justice McReynolds.

The majority opinion of this Court held that the order of the Commission was too broad, and modified it (p. 456). An analysis of this modification imposed by this Court shows that this Court did not consider that the Sherman Act was involved or that any violation of that Act was shown.

In the present case against this petitioner, the Commission completely abandoned its charge that the petitioner and others had fixed resale prices for their products at which dealers were required to sell the same.

The question raised by the petitioner herein as to the jurisdiction and power of the Commission to restrain complete violations of the Sherman Act was not presented to or decided by this Court in the Beechnut case.

Analysis of Pacific States Paper Case.

(*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52.)

In the above case the Federal Trade Commission made an order requiring the respondents to cease and desist from certain methods of competition in interstate commerce

found by it to be in violation of Section 5 of the Federal Trade Commission Act of September 26, 1914 (38 Stat. 717).

From a stipulation of facts the following appeared: Dealers in paper in each of the five principal jobbing centers on the Pacific Coast, covering Seattle, Tacoma, Spokane, Portland, San Francisco and Los Angeles had a local association. The Pacific States Paper Trade Association is a general one, whose members are the paper dealers in the jobbing centers above mentioned, including most but not all of the members of the local associations and some who do not belong to such associations.

This Court, at page 60 of its opinion, stated in substance that the Commission's findings of fact substantially follow the stipulation of facts from which it drew inferences or conclusions that the habitual carrying and use of such association price lists by member jobbers in quoting prices and making sales outside the state had a natural tendency to and did limit and lessen competition therein, and that the result of such practice was fixed and uniform prices for such products within such territories.

In the entire opinion in this case there is no mention of the Sherman Act or of the Clayton Act. The limitation of the powers of the Commission to its purely administrative functions, its lack of judicial power, or that the complaint may have charged complete violations of the Sherman law, and if so, that the Commission, in entertaining the complaint and in making its order, usurped the exclusive powers of the District Court to enforce the provisions of the Sherman Act vested in said courts by said Act, were questions not raised by the respondents in said case.

Commission's Power Under Section 5 of the Federal Trade Commission Act Is Limited to the Administration of Said Act.

In its brief in the Circuit Court the Commission did not contend that it has power to administer or enforce the provisions of the Sherman Act, but it seems clear that the Commission cannot do by indirection what it could not do directly.

The Commission in its brief in the Circuit Court contended that "A combination or conspiracy in restraint of competition, if unlawful under the Sherman Act, is an unfair method of competition within the meaning of the Federal Trade Commission Act." (Br. p. 17.) This is a broad claim which would necessitate a hearing and determination by the Commission that a combination or conspiracy in restraint of competition constituted a violation of the Sherman Act.

The complaint charged full and complete violation of the Sherman Act, including the civil as well as the criminal provisions of said Act. It found as a fact that the acts charged had been done and performed, and that competition had been eliminated, and such finding, if within the Commission's power, was one that would constitute a violation of both the civil and criminal provisions of the Sherman Act.

The conclusion of the Circuit Court, appearing in its opinion (Appendix, p. 7) clearly states that the fact that the acts complained of violate the criminal section of the Sherman Anti-Trust Act, afforded a legitimate basis for the Commission to exercise jurisdiction.

The conclusion of the Court above referred to in effect authorizes the Federal Trade Commission to determine whether or not the criminal section as well as the civil pro-

visions of the Sherman Act had been violated. Such determination requires the exercise of full and complete judicial power which the Commission does not possess. It also requires the Commission to usurp the jurisdiction and powers of the district courts, specifically vested in them by the Sherman Act.

We earnestly contend that said question was not in any manner presented to or passed upon by this Court in the *Fashion Guild* case, the *Beechnut* case, or the *Pacific States Paper Trade Association* case, the only decisions of this Court cited by the Circuit Court to support its decision.

II.

Second Reason Relied on for Allowance of the Writ.

(a) The Circuit Court decided (App. 7) that:

> "Our conclusion is that instead of its being a ground for denying jurisdiction of the F. T. C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords a legitimate basis of action by the said Commission."

The foregoing language of the Circuit Court clearly contemplates that the Commission has the authority, under Section 5 of the Federal Trade Commission Act, to institute a complaint charging complete violations of the criminal section of the Sherman Act, hold a hearing thereon, and then determine that the criminal section of the Sherman Anti-Trust Act has been violated.

And further, following such determination, the Commission may then declare that the criminal violation of the Sherman Act so found to exist constitutes unfair methods of competition prohibited by Section 5 of the Federal Trade Commission Act.

Petitioner contends that the language of the court above quoted is tantamount to saying that the Federal Trade Commission may enforce the provisions of the Sherman Act at least by indirect means, by charging that such acts constitute unfair methods of competition contrary to Section 5, if not by a direct proceeding charging a violation of the Sherman Act by name.

This is quite different from an order to "stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'" or even those "which if left untouched would probably create the evils prohibited by the Sherman Anti-Trust Act."

The decision of the Circuit Court appears to be in conflict with the decisions of this Court in the following cases:

Arrow-Hart & Heggeman Electric Co. v. *Federal Trade Commission*, 291 U. S. 587, holds that the Federal Trade Commission has no jurisdiction over the administration or enforcement of the Sherman Act. In that case, the Commission by its complaint charged that certain corporations finally merged in the appellant, had performed acts in violation of Section 7 of the Clayton Act (p. 593), which forbids the acquisition of stock by one corporation in other corporations where the effect of such stock acquisition is to substantially lessen competition. Section 11 of the Clayton Act provides the remedy for the enforcement of said Section 7.

This Court held that said Section of the Clayton Act had not been violated and that the Commission's order in respect thereto could not be upheld. Apparently the Commission also sought to justify its order on the ground that the activities of the appellant and other corporations merged therein were in violation of anti-trust laws other

than the Clayton Act. In answering this contention the Court, at page 599 of its opinion, said:

> "If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any anti-trust law, as to which we express no opinion, *it was necessarily a violation of statutory provisions other than those found in the Clayton Act.* And *if any remedy for such violation is afforded a court* and *not the Federal Trade Commission* is the appropriate forum." (Italics supplied.)
>
> *Federal Trade Commission* v. *Western Meat Company*, 272 U. S. 554, 561, 563.
>
> *Thatcher Mfg. Co.* v. *Federal Trade Commission*, 272 U. S. 554, 560, 561.

These two cases were disposed of by one opinion. It appeared in the *Western Meat Company* case that the Commission was attempting to invoke the provisions of Section 5 of the Federal Trade Commission Act as well as enforcement of Section 7 of the Clayton Act.

In referring to Section 5 of the Federal Trade Commission Act this Court, on page 557 of its opinion, said:

> "This Section is not presently important. The challenged order sought to enforce obedience to Section 7 of the Clayton Act."

In the *Thatcher Mfg. Co.* case the Commission proceeded under Section 11 of the Clayton Act to enforce the provisions of Section 7 of that Act, and it determined that the acquisition of certain properties of a competitor by the Thatcher Company violated said Section 7. Upon this question this Court, at page 561 of the opinion, said:

> "The act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. • • • If purchase of property has produced an unlawful status, a remedy is provided through the courts. Sher-

man Act, Ch. 647, 26 Stat. 209; Act to Create a Federal Trade Commission, Ch. 311, Sec. 11, 38 Stat. 717, 724; Clayton Act, c. 323, Secs. 4, 15, 16; 38 Stat. 730, 731, 736, 737. *United States* v. *American Tobacco Co.*, 221 U. S. 106."

The reference to the Sherman Act and to the sections of the Clayton Act above cited relate to court remedies under those acts, for the enforcement of the anti-trust laws. Section 11 of the Federal Trade Commission Act cited by this court declares in substance that nothing in said Act shall prevent the enforcement of the anti-trust Acts (38 Stat. 724, 15 U. S. C. A., Sec. 51).

Federal Trade Commission v. *Eastman Kodak Company*, 274 U. S. 619, 623, 624.

The proceeding involved in this case was instituted by the Commission under Section 5 of the Federal Trade Commission Act. In that proceeding the Commission ordered said company to divest itself of certain laboratories acquired by purchase.

This Court, at page 623 of its opinion, in observing that the proceeding was instituted by the Commission under Section 5 of the Federal Trade Commission Act, stated:

"and its authority did not go beyond the provisions of that section."

This Court further said, on the same page:

"The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. * * * It has not been delegated the authority of a court of equity, and a Circuit Court of Appeals, on a petition to review its order, is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission."

On page 624 of its opinion this Court referred to page 561 of the opinion in the Thatcher case (hereinbefore cited) on which is found the quotation in said case already set out, and also referred to Section 15 of the Clayton Act and to the Sherman Act for the judicial remedies in the courts in the event the purchase of property produces an unlawful status.

On page 625 of its opinion this Court said:

> "So here the Commission had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted."

In *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, which involved a proceeding under Section 5 of the Federal Trade Commission Act, this Court said, on page 647 of the opinion:

> "The Sherman Act deals with contracts, agreements and combinations which tend to the prejudice of the public by the undue restriction of competition or the undue obstruction of the due course of trade. *United States* v. *American Tobacco Company*, 221 U. S. 106."

On the other hand this Court, on page 650 of its opinion, in discussing the purpose of, and the evils to be remedied by, the Federal Trade Commission Act said:

> "It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words 'unfair methods' was meant those resorted to for the purpose of destroying competition or of eliminating a competitor, or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor. That the law was necessary to protect small business against giant competitors;" * * *

On page 647 of the opinion this Court said:

> "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

In referring to the powers of the Federal Trade Commission under Section 5 of the Act this Court, on page 649 of its opinion, said:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desired, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

(b) The decision of the Circuit Court quoted above in paragraph (a) imputes to the Commission, a purely administrative agency, the power to determine violations of the Sherman Act. This is a holding that the Commission may determine the existence of violations of a law that it has no power to administer and then order such violations stopped. It would require the Commission to exercise the full and complete judicial power possessed only by a court and which can be conferred only upon a court (Const. Art. III). The decision of the Circuit Court therefore is in conflict with the following decisions of this Court:

> *Federal Trade Commission* v. *Eastman Kodak Company,* 274 U. S. 619, 623, 624.

This case involved the validity of an order of said Commission purporting to have been issued by it under the provisions of Section 5 of the Federal Trade Commission Act, and this Court on page 623 of its opinion made the statement last quoted on page 18 hereof.

Union Bridge Co. v. *United States,* 204 U. S. 364, 386, 387. The bill in this case charged that Section 18 of the Rivers and Harbors Act of March 3, 1899, delegated to the Secretary of War full and complete legislative as well

as judicial powers, and was therefore in conflict with the Constitution of the United States.

The Act complained of authorized the Secretary of War, after hearing, to determine whether or not a given bridge constituted an unreasonable obstruction to navigation. After considering the contentions of the Bridge Company this Court, in construing the statute complained of, said (p. 386):

> "In no substantial, just sense, does it confer upon that officer, as the head of an executive department, powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts.",

and on page 387 of its opinion in said case this Court further said, concerning the duty imposed upon the Secretary of War by said section of the statute complained of:

> "In performing that duty the Secretary of War will only execute the clearly expressed will of Congress and will not in any true sense exert legislative or judicial power."

Monongahela Bridge Co. v. *United States*, 216 U. S. 177. This case involved the same statute considered by this Court in the *Union Bridge Company* case, *supra*. The Monongahela Bridge Company asked this Court to reconsider its decision in *Union Bridge Co.* v. *United States*, 204 U. S. 364, and to modify the same. In this connection this Court said, on page 192 of its opinion:

> "We perceive no reason for so doing. We adhere to what was said in that case."

(e) The decision of the Circuit Court quoted in paragraph (a) hereof is in conflict with the decisions of this Court hereinafter cited, which hold that an administrative agency, including the Federal Trade Commission, has no power to enforce laws the administration of which is specially confided to another governmental agency, or to determine violations of such other laws.

Federal Trade Commission v. *Raladam Company*, 283 U. S. 643, 649, 654. In this case this Court, in considering the action of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, said (p. 654):

> "Whether the respondent, in what it was doing, was subjecting itself to administrative or other proceeding under the statute relating to the misbranding of foods and drugs we need not now inquire, for the administration of that statute is not committed to the Federal Trade Commission."

Brougham v. *Blanton Mfg. Co.*, 249 U. S. 495, 499, 500. In this case this Court held that the United States Patent Office, acting through its trademark division, as to a duly registered trademark on meat products, had no power to determine whether said mark was deceptive, because the power to determine that question as to meat products had been specially granted to the Secretary of Agriculture under the meat inspection laws (pp. 499, 500).

Keogh v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 162. In this case this Court held that the Interstate Commerce Commission is required, under the Interstate Commerce Act, to determine the legality or illegality of freight rates wholly under the terms of said Act and without regard to the charge that they were the result of an unlawful combination of carriers in violation of the Sherman Act.

(d) The decision of the Circuit Court set forth in paragraph (a) hereof is in conflict with the decisions of this Court in the cases cited below, which hold that the Federal Trade Commission should move before the agreements, understandings, combinations, conspiracies, restraints or monopolies are completed.

Fashion Guild v. *Federal Trade Commission*, 312 U. S. 457, 466. In this case this Court, at page 464 of its opinion, said:

> "It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act, that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency" (citing *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 647, and the report of Senator Cummins, Chairman Committee reporting Federal Trade Commission Act, 51 Congressional Record, 11455).

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 645, 647. In this case this Court, at page 647 of its opinion, stated:

> "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

Federal Trade Commission v. *Raladam*, 316 U. S. 149, 152. In this case this Court, at page 152 of its opinion, stated:

> "One of the objects of the Act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipiency. *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466."

III.

Third Reason Relied on for Allowance of the Writ.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The Circuit Court decided that:

> "Hardly worthy of serious or extended consideration is petitioners' urge that the order should be set aside because no competitor was hurt by the practices and agreements. To carry this contention to its logical

conclusion would necessitate denial to the Commission of jurisdiction to deal with any price fixing agreement to which all in the industry have subscribed. In other words, if this contention were accepted, it would only be when one or more competitors are left out or refuse to subscribe to the price-fixing agreement that the Federal Trade Commission could intervene. This would defeat the purpose of the Act. Price fixing usually results in price raising. That, and the elimination of price cutting, are the objects of such agreements. It is not often that any competitor in the industry is hurt by an agreement which raises the prices or an agreement which prevented the cutting of prices. The ordinary and necessary result would be financial advantage, at least temporary advantage to all in the industry. But it would not be to the advantage of the public or to the users of the commodities whose prices are fixed.

"'Unfair methods of competition' are not determined by so narrow or one-sided a test. It is the harm, which results from destroying the '*fair opportunity*' for competition among competitors which results from a price fixing agreement, created and established by such combination, that makes the action unfair as that term is used in the Act. It is the restriction on the play of competition under normal conditions that presents a case of 'unfair method of competition.' (*F. T. C.* v. *Pacific Paper Assn.*, 273 U. S. 52; *Cal. Rice Industry* v. *F. T. C.*, 102 F. 2d 716, 722.)" (Appendix, pp. 7, 8.)

The first paragraph of the decision of the Circuit Court above quoted indicates that the court considered as the prime question before it, the need to preserve the jurisdiction of the Federal Trade Commission, as it seemed to think otherwise no remedy would exist. It did not consider that, under the facts stated, there was a specific, direct and positive remedy, under the Sherman Act, that was exclusive of any remedy before the Federal Trade Commission.

In its decision above quoted the Circuit Court made no reference to the case of *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 647, 654, or the same case in 316 U. S. 149, 152, which hold that some competitor must be injured or his business injured by the unfair methods of competition alleged. It was said by this Court in the cases last cited that without such competitive injury the order of the Commission must fail. But the Circuit Court says (App. 8); in substance, that the unlawful agreement to fix prices would be to the injury of the public and the users of the commodities, and this seems in the mind of the Court to over-ride the rule in the Raladam cases, *supra*.

This concept of the law, however, makes two rules: one in which, when unfair methods of competition are alleged in the absence of a conspiracy, there must be the public interest and the injury to the competitor, and the other, when conspiracy is alleged, as constituting unfair methods of competition, no injury to a competitor is necessary—the injury to the public being deemed sufficient—although by the provisions of the act in each instance the complaint will not lie, unless its institution is determined to be in the public interest.

In so holding the Circuit Court has decided a federal question in conflict with the decisions of this Court in *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 645, 647, 654; *Federal Trade Commission* v. *Raladam*, 316 U. S. 149, 152.

IV.

Fourth Reason Relied on for Allowance of the Writ.

The Circuit Court in its decision relating to subsection 3.1 of Section 3 of Article II of Exhibit 11a and referred to in footnote * * * (App. 3) appears to be in conflict with the decision of this Court in the case of *Sugar Institute* v.

United States, 297 U. S. 553, and especially that part of the opinion appearing on page 601.

The subsection above referred to follows a statement in said exhibit as follows:

> "The practices described below are declared to be unfair and destructive to industry welfare."

Then follows Section 3.1 aforesaid, which is as follows:

> "3.1. Sell, or offer to sell, directly or indirectly, any product of the Section on which price information has been published, at less than the lowest net price published by any member on such product or products; nor sell, or offer to sell, products which are not covered by such price lists but which are similar to listed products, at net prices more favorable to the purchaser than the lowest published net price."

Section 3.1 taken by itself does not in form constitute an agreement. It is only the expression of an opinion. There is nothing in the meeting of June 1, 1936 that indicates that the parties were agreeing to maintain the prices already on file with the section and which had been filed during the Code period, and which they voted not to maintain at the Atlantic City meeting in June, 1935.

The most that can be said is that as a declared policy it would be detrimental to the welfare of the industry to do the things specified in said Section 3.1, but there is nothing therein to prevent the petitioner or any other member of the section from selling at prices different from those quoted by others, if petitioner or other members saw fit so to do.

There was no limitation on the right of the individual to establish his own prices at any time that he might so elect. His determination to sell at a lower price would be concurrent with his establishment of his lower price. There was no restriction or limitation upon individual action such

as appeared in the case of *Sugar Institute* v. *United States*, 297 U. S. 553, 601.

In the Sugar Institute case this Court clearly did not condemn mere price filing, or the making of advance announcements, or the mere filing of such prices with the Sugar Institute. This Court held in that case that the required maintenance of the filed prices, until changed, was a restriction upon individual action, and therefore unreasonable. In said case this Court said, at page 601 of its opinion:

> "The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade * * *. The trial court did not hold that practice to be illegal and we see no reason for condemning it. * * *. The unreasonable restraints which defendants imposed lay not in advance announcements but in the steps taken to secure adherence without deviation to prices and terms thus announced. * * * But in ending that restraint the beneficial and curative agency of publicity should not be unnecessarily hampered.
>
> "* * * On the other hand such provision for publicity may be helpful in promoting competition." (p. 602)

V.

Fifth Reason Relied on for Allowance of Writ.

That the Circuit Court of Appeals has so far sanctioned the departure from the accepted and usual course of judicial proceedings by the Federal Trade Commission in depriving petitioner of a full hearing as required by Section 5 of the Federal Trade Commission Act as to call for an exercise of this Court's power of supervision.

At the hearing before the Commission, it called as a witness one McDonald, an Examining Agent in its employ, who had been directed to investigate the subject

matter of the complaint (R. 458, 459). His testimony given on direct as well as on cross-examination appears in the record at pages 449-466, inclusive.

In the course of his investigation he obtained from the files of other respondents copies of correspondence and documents which he thought showed violations of the Federal Trade Act, as well as those which showed no violations, but all related to the subject of the investigation, were taken at the same time, and all were delivered to the Commission (R. 458, 459). Part of that correspondence and documents so obtained was embraced in Exhibits 155 to 159 inclusive (R. 452; 454; 455; 456) which, over the objection of petitioner, were offered and received in evidence. The remaining portion of such correspondence and documents was retained by the Commission. The originals of all of said correspondence and documents had been lost or destroyed (Thomerson, attorney for the Commission, R. 456) and copies thereof were not available from any other source. (R. 298, 313, 314, 315).

Upon petitioner's request for the production of the additional correspondence and documents above referred to (R. 457), the production thereof was refused by the attorney for the Commission (R. 457), which action was later confirmed by the Commission (R. 97-102).

Petitioner contended before the Commission (R. 97-102) that its refusal to produce the additional correspondence in its possession, after offering part thereof obtained by its witness McDonald, and its refusal to strike the said exhibits from the record, deprived petitioner of the full and complete hearing required by Section 5 of the Federal Trade Commission Act. This contention was also made before the Circuit Court (R. 842) coupled with the additional one that deprivation of said hearing as contemplated by the statute, denied petitioner due process of

law, in violation of the Fifth Amendment to the Constitution of the United States (Brief, Point IV, pp. 57, 93, 94. 95).

The Circuit Court did not pass upon the questions so presented to it by petitioner. It thus sanctioned the action of the Commission.

The refusal of the Circuit Court to pass upon said question appears to be in conflict with the decision of the Sixth Circuit in the case of *Powhatan Mining Co.* v. *Ickes*, 118 Fed. (2d) 105, 108, 109. In that case a substantially similar question was involved. That Court held that the failure and refusal of the Bituminous Coal Commission and its subordinates to produce at the hearing before it, and make a part of the record, pertinent data in its possession based on confidential information received by it, did not accord a full hearing as required by the statute, and constituted a lack of due process.

The refusal of the Circuit Court in this case to pass upon said question also appears to be in conflict with the decisions of this Court in the following cases:

Interstate Commerce Commission v. *Louisville & Nashville Railroad*, 227 U. S. 88, 90, 91, 92, 93. In that case this Court, on page 90 of its opinion, said:

> "In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair. * * *
>
> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal."

Morgan v. *United States*, 298 U. S. 468, 479, 480. In that case, this Court, in considering the duty of the Secre-

tary of Agriculture in the making of rates or charges, on page 480 of its opinion, said:

> "It is a duty which carries with it fundamentally procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion."

Morgan v. *United States*, 304 U. S. 1, 14, 15, 18, 19. This is the same case above referred to, and this Court reaffirmed its prior decision.

On pages 18 and 19 of its opinion, this Court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.
>
> "Those who are brought into contest with the Government in a quasi judicial proceeding aimed at the control of their activities are entitled to be advised of what the Government proposes, and to be heard upon its proposal, before it issues its final command."

Refusal of the Commission to furnish the additional correspondence and documents requested by petitioner was clearly an abuse of power. The Commission, having offered part of the correspondence and documents obtained, was, upon request of petitioner, in duty bound to furnish the remainder.

The concealed correspondence was evidently favorable to petitioner and other respondents. It was not available from any other source. The action of the Commission as aforesaid clearly denied the petitioner a full hearing. The Circuit Court, in refusing to pass upon the contention of petitioner in respect to the same, clearly sanctioned a de-

parture from the accepted and usual course of judicial proceedings, which deprived the petitioner of the full hearing required by the statute, and resulted in a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

VI.

Sixth Reason Relied on for Allowance of Writ.

The Circuit Court in this case has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter. The decision of said court appearing in the first paragraph (App. p. 7) is in conflict with the following decisions of the Circuit Court of Appeals in other circuits:

Butterick Publishing Co. v. *Federal Trade Commission* (Second Circuit), 85 Fed. (2) 522, 525, 526, which holds that the Federal Trade Commission is not an agency for the enforcement of the Sherman Anti-Trust Act, and that the Federal Trade Commission Act was in part aimed at the elimination of methods of competition called unfair, *which if left untouched would probably create the evils prohibited by the Sherman Anti-Trust Act.*

American Tobacco Company v. *Federal Trade Commission*, 9 Fed. (2) 570 involved an order of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act in which the Circuit Court of Appeals for the Second Circuit holds that the question involved in that case was not whether the acts of the American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman law; that the Commission was not clothed with jurisdiction to hear and determine that question; that its authority to make the order which it entered was restricted to matters of unfair competition (Opinion, p. 586).

United Corporation v. *Federal Trade Commission*, 110 Fed. (2d) 473, 474. In this case the Circuit Court of Appeals for the Fourth Circuit held that the Federal Trade Commission had no power to make a valid order purportedly under Section 5 of the Federal Trade Commission Act, where the activities of the respondent were at the time of the making of the order subject to Sections 202 and 203 of the Packers and Stockyards Act (42 Stat. 161, Secs. 192, 193; 7 U. S. C. A.) under which the jurisdiction to consider such activities had been exclusively given to the Secretary of Agriculture (Opinion, p. 475).

Chamber of Commerce v. *Federal Trade Commission*, 13 Fed. (2d) 673, 685, in which the Circuit Court of the Eighth Circuit held that the Federal Trade Commission had no authority to enter an order on a complaint charging violations of Section 5 of that Act, where the facts alleged brought the subject matter of said complaint within the special jurisdiction of the Secretary of Agriculture under the provisions of the Grain Futures Act (Sec. 1, *et seq.*, Title 7, U. S. C. A.).

Powhatan Mining Co. v. *Harold Ickes, et al.*, 118 Fed. (2d) 105, 108, 109, in which the Circuit Court of Appeals for the Sixth Circuit held that the failure and refusal of the Bituminous Coal Commission and its subordinates to produce at the hearing before it, and make a part of the record, pertinent data in its possession based on confidential information received by it, did not accord a full hearing as required by the statute and constituted lack of due process.

California Lumbermens' Council v. *Federal Trade Commission*, 103 Fed. (2d) 304, 305, in which the Circuit Court of Appeals for the Ninth Circuit held that if petitioners have been deprived of a fair trial, the order of the Commission is invalid as violative of due process.

Conclusion.

For the reasons herein stated, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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